Supreme Court, U.S.
FILED
MAR 2 3 2006
OFFICE OF THE CLERK

No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Patricia G. Mattos
MATTOS LAW OFFICE
595 Selby Ave.
St. Paul, Minn. 55012
(651) 726-2514

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

March 23, 2006

Counsel for Petitioners

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Jose Antonio Lopez submits this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Seventh Circuit in *Gonzales-Gomez* v. *Achim*, No. 05-2728, 2006 U.S. App. LEXIS 7066 (7th Cir. March 22, 2006).

Judge Posner's opinion for the Seventh Circuit in *Gonzales-Gomez* conflicts with the Eighth Circuit's decision in this case on the precise question presented for review. The Seventh Circuit thus joins the Second, Third, Sixth, and Ninth Circuits, which have all held that a state-law felony that would be punishable only as a misdemeanor under federal law is not an "aggravated felony" for purposes of federal immigration law. *See* Pet. 9-12.

Gonzales-Gomez, like Petitioner, was a lawful permanent resident of the United States who was convicted of a drug possession charge. *Gonzales-Gomez*, slip op. at 1. Gonzales-Gomez's conviction was a felony under Illinois law, but the conduct charged amounted only to a misdemeanor under the federal Controlled Substances Act. *Id.* Like Petitioner, Gonzales-Gomez applied for cancellation of removal, but was denied when the Immigration Judge and the Board of Immigration Appeals held that his state-law drug possession felony constituted a federal "aggravated felony." *Id.* at 1-2. The Seventh Circuit disagreed. The court granted Gonzales-Gomez's petition for review, holding that a state-law drug possession felony is not an "aggravated felony" for purposes of the immigration law. *Id.* at 7.

The court held that the government's contrary position "is a strained reading of the statutory language, is inconsistent with the government's general position regarding the definition of 'aggravated felony,' is inconsistent with the interest in uniform standards for

removal, and is inconsistent with the legislative history." *Id.* at 2.

The court traced the statutory cross-references defining "aggravated felony" in the immigration context and held that "[t]he implication of this chain of incorporations is that if you commit a *felony violation of the Controlled Substances Act* you are guilty not just of an ordinary felony, but of an 'aggravated felony.'" *Id.* at 3 (emphasis added).

The court rejected the government's position that a state-law drug felony is "punishable under the Controlled Substances Act," and noted that the legislative history of 18 U.S.C. § 924(c) contained "no hint that commission of a state drug offense is now to be deemed the commission of a federal drug offense." *Id.* at 4. The court also rejected the government's argument that "it is too difficult for the immigration authorities or the courts to determine whether conduct that resulted in a state felony conviction would also have been a felony under the Controlled Substances Act": 'So long as the quantity is known, there is rarely any mystery about whether the defendant committed a felony violation of the Act." *Id.* at 4-5.

Finally, the court noted the negative implications of the position advanced by the government: "Allowing cancellation of removal to depend on how severely a particular state punishes drug crimes would have the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law. For then if a state made the possession of one marijuana cigarette a felony, which it is perfectly entitled to do, it would be in effect annexing banishment from the United States to the criminal sanction. States do not have the power to banish people from the United States." *Id.* at 5. While "Congress could permit [grounds for allowing aliens to remain in the United States] to vary from state to state, . . . it would be unlikely to do so (and it has not done so)." *Id.* at 6.

The Seventh Circuit's opinion in *Gonzales-Gomez* further exacerbates the circuit split identified in the petition for certiorari. As the government agreed in its acquiescence to certiorari, "the question presented has been broadly considered by the courts of appeals and the conflict is entrenched and multi-dimensional." Resp. Br. 9. The Seventh Circuit's opinion validates Respondent's prediction that "[f]urther consideration of the question by other courts of appeals will simply exacerbate, rather than ameliorate, the conflict." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Patricia G. Mattos
MATTOS LAW OFFICE
595 Selby Ave.
St. Paul, Minn. 55012
(651) 726-2514

Robert A. Long
Counsel of Record
Theodore P. Metzler
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